Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations	)	
	)	
Amendment to Part 76	)	
of the Commission's Rules	)	

To the Commission:

COMMENTS OF UCC, *et al.*

Gigi B. Sohn
Andrew Jay Schwartzman
Cheryl A. Leanza

Media Access Project
1707 L Street, NW
Suite 400
Washington, DC 20036
202-232-4300

Counsel for UCC, et al

Law Student Intern:

Sabrina L. Youdim
UCLA School of Law

October 13, 1998

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

To the Commission:

COMMENTS OF UCC, *et al.*

The Office of Communication of the United Church of Christ, Inc., Media Access Project, the Benton Foundation, the Center for Media Education and the Civil Rights Forum ("UCC, *et al.*") respectfully submit these comments on digital television must carry rules. *See Notice of Proposed Rulemaking*, FCC No. 98-120 (released July 10, 1998) ("*NPRM*"). As discussed below, UCC, *et al.* believe that the Commission should refrain from adopting must carry rules until complex technological, economic and legal issues surrounding digital TV are resolved. If the Commission nonetheless determines to proceed with this rulemaking, it should determine that must carry for digital TV signals is not statutorily mandated, and the public interest would best be served if it does so only in a circumscribed manner.

SUMMARY AND INTRODUCTION

In the absence of compelling evidence that mandatory carriage rules are necessary within the next two years, the Commission should postpone this inquiry.

No party involved in the debate over mandatory carriage for digital TV signals disputes its importance. The decisions the Commission makes here will likely determine the standards, timing and nature of DTV service for years to come. But the tentative nature of the Commission's *NPRM* is quite revealing and also quite understandable. Whatever pressures industry,

Congress or the financial community may have brought to bear on the Commission to start this proceeding, the fact remains that legal, technical and economic factors which must be addressed in the resolution of the *NPRM* are not as yet fully developed. Simply put, it is too early to propound digital must carry rules.

Uncertainties abound. They include:

- Unanswered technological questions as to whether and how cable systems can retransmit over-the-air digital broadcasts;
- Many broadcasters' inability to develop clear business plans in the face of ever-evolving DTV technology. If the full scope of DTV services is unclear, the Commission cannot properly decide which services are entitled to must carry;
- Pendency of a private agreement on must carry and retransmission consent between the major networks and largest cable operators; and
- Undefined scope of public interest responsibilities for either analog or digital licensees.

If the Commission nonetheless decides to proceed at this time, it must do what it has failed to do in the *NPRM*: recognize, and place great weight upon, the viewing public's right to retain access to free over-the-air programming from commercial and non-commercial sources as well as to the diversity of voices that cable can provide. Any rules it may adopt should ensure that:

- the public has the broadest access to the greatest possible diversity of information and ideas and
- the conversion to digital TV is accomplished as rapidly as possible consistent with that goal.

This is much more than a "battle" between broadcasters and cable operators.

As discussed below, UCC, *et al* believe that the public's rights are best preserved and a speedy transition to digital best advanced if the Commission

- gives commercial broadcasters the benefit of choosing carriage for either their

unsettled technological, economic and legal issues for the Commission to make a reasoned decision. Moreover, it is not apparent that must carry rules are necessary before May 1, 2002. The Commission should therefore defer its determination of this matter until some of these issues are settled.

A. Must Carry Rules are Unnecessary at this Time.

It is unclear that must carry rules are necessary much before May 1, 2002. As the Commission notes, 80% of stations elected retransmission consent in the last election cycle, and the four major networks are in the process of negotiating a retransmission consent agreement with the largest cable operators for their owned and operated stations and affiliates. *NPRM* at ¶33. Thus, for the most part, those stations most in need of must carry will be non-network affiliated stations in the smallest markets. These stations have until May 1, 2002 to construct their digital facilities. Because building these facilities will be a greater burden financially on these stations, it is unlikely that many will do so much before that date.

Nor is there any great need for must carry in the near term to ensure that members of the public receive digital signals. By many accounts, digital receiver penetration is expected to be very slow in the first few years of the transition. Forrester Research estimates that no more than 25% of households will have digital receivers by the year 2004. *See* Testimony of Josh Bernoff, Forrester Research, before the Advisory Committee on Public Interest Obligations for Digital TV Broadcasters, found at http:\\www.ntia.doc.gov. Stanford Resources projects that by 2004, only 2.2 million digital TV receivers will have been shipped to the U.S., Europe and Japan. Stephanie Miles, "Uncertainty, high price slow HDTV," October 2, 1998, found at http://www.news.com:80/News/Item/0,4,27040,00.html?owv. High prices ($5000 to $10,000,

plus the cost of set-top boxes) for the first shipments of receivers will exacerbate that situation. Laura Evenson, "Digital TV: Please Stand By" *San Francisco Chronicle*, September 3, 1998.

B. Technological, Legal and Economic Uncertainties Make Adoption of Must Carry Rules Inappropriate.

As described in the comments being filed today by Microsoft Corporation, open technical issues surrounding the interoperability of digital TV signals, cable systems and digital receivers make adoption of must carry standards impractical. Problems for which there are as yet no technological solutions include the need for effective copy protection, for standards to support Internet Protocol Transmission, and for affordable "pass through" and "remodulation" techniques. Mandating must carry prior to the resolution of these technological issues could have the effect of stifling growth of new DTV services, postponing viewer acceptance of digital TV, and delay in the return of the "analog" spectrum.

The reluctance of many broadcasters to devise and/or disclose their business plans for digital TV also makes adoption of carriage rules and standards inappropriate at this time. They argue, sometimes justifiably, that DTV technology is still evolving at such a pace that it would be a grave mistake to commit to any particular services at this time. But the broadcasters cannot at the same time argue that evolving DTV technology make imposition of new public interest obligations premature, but that must carry benefits are justified. Moreover, this constant technological evolution means that the Commission cannot now properly decide what services qualify for must carry privileges under Section 614(b)(4)(B) of the 1992 Cable Act.

Finally, the Commission cannot properly promulgate must carry rules until it resolves the question of what public trusteeship will mean in the digital age. Congress justified must carry for analog stations based upon, among other things, the locally originated and news and public

affairs programming those stations provided. 1992 Cable Act §§2(a)(10)&(11). It was these and other "predictive judgments" that the Supreme Court found warranted must carry for analog stations. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 117 S.Ct. 1174, 1190-1197 (1997) (*Turner II*). If local programming continues to shrink or remain non-existent and if the Commission fails to require even a minimal amount of such programming, the agency will find it extremely difficult to justify carriage of the analog ***and*** digital signals in the face of a constitutional challenge. But the promised proceeding by which the Commission will decide the scope of digital broadcasters public interest obligations has not even begun.[1]

II. DIGITAL MUST CARRY DURING THE TRANSITION PERIOD IS A MATTER OF FCC DISCRETION, NOT A STATUTORY MANDATE.

The Commission seeks comment on "whether to amend the cable television broadcast signal carriage rules, embodied in must carry and retransmission consent, to accommodate the carriage of digital broadcast television signals." *NPRM* at ¶2. The Commission's inquiry is triggered by Section 614(b)(4)(B) of the 1992 Cable Act, which requires that:

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

47 USC §534(b)(4)(B).

UCC, *et al.* urge the Commission to hold that digital must carry is not statutorily mandated, and in some cases, is prohibited. They agree that the 1992 Cable Act, as well as

---

[1]Moreover, the Advisory Committee on Public Interest Obligations for Digital Television Broadcasters, which will make recommendations to the FCC on this issue will not finish its deliberations until December 31, 1998 at the earliest.

Section 309(j) of the Balanced Budget Act, and their respective legislative histories, give the FCC "broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting." *NPRM* at ¶13. Since nothing in the plain language of either statute or their legislative histories requires the Commission to adopt rules mandating carriage for both broadcasters' analog and digital signals during the transition period, the Commission has discretion to limit must carry privileges as circumstances justify.

At best, the plain language of Section 614(b)(4)(b) is ambiguous as to digital TV signal carriage requirements during the transition period. There is no explicit mandate for digital must carry during this period. The language used in this provision lends itself to a number of reasonable interpretations. For instance, the Commission notes that the cable industry "argues that the phrase 'have been changed' means that the television station's analog signal has ceased broadcasting and the station's digital signal has replaced it as the over the air service." *NPRM* at ¶50. This interpretation would not provide carriage for digital signals until the end of the transition period. However, the broadcasters will likely argue that a "change" takes place as soon as a television station begins broadcasting its digital signal. That could be seen to require carriage during the transition.

In light of such statutory ambiguity, where Congress has left a gap for the Commission to fill, "there is an express delegation of authority to the [Commission] to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 843-844 (1984). Any rules the Commission creates with regard to signal carriage requirements will be "given controlling weight unless they are arbitrary , capricious, or manifestly contrary to the statute." *Id.* at 844. In the absence of any clear direction from Congress on

digital must carry, the Commission has wide latitude to adopt rules that serve the dual purposes of expediting the transition to digital and preserving valuable and popular cable programming.

The only express direction in the statute is actually a prohibition, albeit one applicable only in certain cases. Section 614(b)(5) of the 1992 Cable Act provides that:

> [A] cable operator ***shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system***, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation).

47 USC Section 534(b)(5). [Emphasis added.]

This duplication problem is not theoretical. In the early stages of digital television, many broadcasters are likely simply to duplicate their some of their analog programming either in HDTV or SDTV formats. *See, e.g.* Stephanie Miles, *supra*. And, as the Commission notes, later in the transition, licensees will be required to replicate most or all of the analog signal on the digital stream. *NPRM* at ¶1.

Mandatory carriage of identical programming, even in different formats, contradicts Congress' intent in adopting Section 614(b)(5). Congress intended for this provision to "preserve the cable operator's discretion while ensuring access by the public to diverse local signals." S. Rep. No. 92, 102d Cong., 1st Sess. at 85 (1991). Where a broadcaster's digital programming merely duplicates its analog programming (which is required to be carried during the transition), mandatory carriage of the duplicative digital programming not only results in no increase in diversity of local signals, it ***decreases*** diversity and choice to the extent that valued cable programming must be dropped to make space for the extra digital signal.

III. THE COMMISSION SHOULD PERMIT COMMERCIAL BROADCASTERS TO CHOOSE MUST CARRY FOR ONLY ONE SIGNAL, EITHER ANALOG OR DIGITAL.

The Commission correctly recognizes that the most difficult issues surrounding must carry occur during the transition period. *NPRM* at ¶39. The transition, may, in theory, last only until 2006, but it will likely stretch far beyond then. The 1997 Balanced Budget Act permits extremely liberal waivers of the Commission's requirement that broadcasters return one of their two blocks of spectrum required for service during the transition period. *NPRM* at ¶12. To balance competing concerns of encouraging the most rapid penetration of digital TV with the problems of redundancy and with the prospect of the loss of popular and valuable cable programming, the Commission puts forth a range of possible options for must carry during the transition period. *NPRM* at ¶39-51.

There is no legal, economic or other public interest justification for carriage of a licensee's digital and analog signals during the transition period. The public's interests in a diversity of viewpoints and a speedy transition to digital can be best accomplished if broadcasters are given the option of electing carriage of either its analog or digital signals.

A. Must Carry of Both Signals During the Transition Does Not Result in Increased Diversity, nor is it Necessary for the Financial Health and Survival of Broadcasters.

UCC, *et al.* are sympathetic to these competing concerns. The signatories to these comments have advocated a speedy DTV transition, and criticized the 1997 Balanced Budget Act as a ticket to almost endless waivers of the spectrum return date. However, as discussed above, UCC, *et al.* see no diversity benefit in forcing cable operators to carry duplicative programming, if not at first, then certainly later on. This is especially true if the cost of providing such

duplication will be loss of cable programming - a result that is certain to occur if digital must carry is forced on those cable systems that have not yet upgraded their capacity.

Moreover, the financial conditions which justify analog must carry are not the same during the transition, even for the smaller stations that will not receive retransmission consent. Forrester Research issued a report earlier this year which found that local television stations had 41 percent profit margins. Forrester Research, "The Great Portal Shakeout," March 1998. The *New York Times* also recently reported that local television stations are experiencing an incredible profit boom, aided in part by analog must carry:

> even underperforming TV stations often manage to hit 30-35 percent profit margins. Stations also continue to be sold at extravagant prices. Just last August, the Hearst-Argyle station group bought an NBC affiliate in Sacramento, Calif. for $520 million. The price is about 15 times the station's annual profit, one of the highest multiples ever paid for a television station.

Bill Carter, "Is Television's Future in This Man's Hands?, *New York Times*, October 4, 1998 at Section 3, p. 1. This must carry benefit continues during the transition, so there is no threat of stations being dropped and subsequently losing their core advertising base. Nor will these threats be present after the transition is completed - Section 614(b)(4)(B) of the 1992 Cable Act requires carriage of the digital signal at that point in time.

B. The "Either-Or" Proposal Best Promotes the Public's Interests in Diversity of Programming and A Speedy Transition to Digital TV.

UCC, *et al.* believe that the most market-friendly and statute-friendly solution is the Commission's "Either-Or" proposal. This proposal permits broadcasters to determine which of their two signals they would like to have carried. As penetration of digital receivers increases, compatibility between digital TV and cable improves, and broadcasters develop more certain business plans for their new bitstream, each broadcaster can decide which of its signals it would

prefer to be carried. The proposal is also beneficial because it avoids duplicate signals and does not require that cable operators provide any more capacity to broadcasters than they do currently. In this way, "either-or" benefits broadcasters without unduly burdening cable operators.[2]

UCC, *et al.* disagree with the Commission's proposal, however, to the extent that it suggests that the carriage option should default to the digital signal in the year 2005. Some experts have predicted that digital receiver penetration will still be well below even 50% at that time, and a broadcaster may determine that it is better to continue mandatory carriage of the analog signal. *See* discussion at 4-5, *supra.*

IV. NONCOMMERCIAL BROADCASTERS' ANALOG AND NON-DUPLICATIVE DIGITAL SIGNALS SHOULD BE CARRIED DURING THE TRANSITION.

UCC, *et al.* believe that the Commission has ample statutory authority to mandate must carry of both the analog and digital signals of noncommercial stations, and that as a matter of sound policy, it should do precisely that. However, this generous must carry privilege should only be available to 1) non-duplicative programming and 2) programming that is not advertiser-supported.

A. The Commission Has The Authority to Require Carriage of Noncommercial Stations' Digital and Analog Signals During the Transition.

The Commission properly observes that the digital must carry provision, 47 USC

---

[2]Since neither analog nor digital signals take up more than 6MHz of capacity, a cable system will not have to drop programming regardless of which signal the broadcaster chooses to have carried, because there will be no change in the system's capacity. Indeed, if a broadcaster uses part of its bitstream capacity for "ancillary or supplementary" services (for which the FCC is prohibited from requiring carriage), the cable operator may actually ***increase*** capacity for its own use under this proposal.

§534(b)(4)(B), specifically applies only to commercial stations *NPRM* at ¶57.[3] However, this section must be read in conjunction with Section 615(b) of the 1992 Cable Act, which states that

> Each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television stations requesting carriage.

47 USC §535(b).

This language is broad enough to give the Commission discretion to mandate carriage of both signals for "qualified" public stations during the transition. Nor is there any language in Section 615 or elsewhere in the Act that explicitly prohibits such a result. In the absence of any express prohibition, the Commission has broad ancillary authority and powerful precedent that permits it to regulate cable to ensure the viability of noncommercial television stations. 47 USC §154(i);[4] 47 USC §303r;[5] *U.S. v. Southwestern Cable*, 392 U.S. 157, 174-178 (1968).

The Commission's broad powers to adapt must carry rules are grounded not just in the 1992 Cable Act, but also in public interest standard, which underlies all of its actions. In *U.S. v. Southwestern Cable*, 392 U.S. at 167-178, approvingly cited in both *Turner I* and *Turner II*, *e.g.*, *Turner I*, 114 S.Ct. 2445, 2469 (1994), the Supreme Court specifically held that the public interest standard gives the Commission authority to adopt, restrict and amend must carry provisions. The Court ruled that

---

[3]The Commission cites to 47 USC §535(a), but the language it refers to is found in 47 USC §535(b).

[4]That section reads, in its entirety, "The Commission may perform any an all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 USC §154(i).

[5]That section gives the Commission the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...." 47 USC §303(r).

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. *** We have elsewhere held that we may not "in the absence of compelling evidence that such was Congress' intention***prohibit administrative action imperative for the achievement of an agency's ultimate purposes."... There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate***communication by wire or radio" permits the regulation of CATV systems.

U.S. v. Southwestern Cable, 392 U.S at 177. (*quoting Permian Basin Area Rate Cases*, 390 US 747, 780 (1968)(other citations omitted).

Here, as in *U.S. v. Southwestern Cable*, there is no indication that Congress intended to limit the Commission's powers to adapt carry rules to changing circumstances, or otherwise circumscribe its powers outside of the specific requirements it set forth.

As discussed in detail below, noncommercial stations are most in need of the Commission's assistance to remain viable in the digital age. Thus, the Commission should exercise its authority "that is reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting," and mandate must carry for nonduplicative noncommercial digital TV programming.[6]

B. Non-Duplicative Digital Programming that is Not Advertiser Supported Should Receive Must Carry Benefits During the Transition.

The question of whether noncommercial TV stations should get mandated carriage of both signals is different, but should also be answered in the affirmative for two reasons. First, unlike commercial television stations, whose profits are robust, *see* Forrester Research, "The Great

---

[6]The fact that Congress expressly provided a digital must carry provision for commercial stations does not change that result. *E.g.*, *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (The expressio *unius maxim* - that the expression of one is the exclusion of others - "has little force in the administrative setting where [the court] defer[s] to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.'").

Portal Shakeout," *supra*, appropriations for noncommercial stations have remained flat over the past 5 years, and will remain so at least until 1999.[7] Moreover, while local stations originally requested $771 million for the transition to digital, Paige Albiniak, "PBS Switch to DTV May Get Pushed Back," *Broadcasting & Cable*, April 27, 1998 at 6, the President's Budget contains $450 million, none of which was appropriated in the most recent budget cycle. Thus, unlike commercial stations, noncommercial stations have a compelling need for carriage of digital signals to attract increased underwriting, increased viewer contributions and other increased revenues from sales of program related materials.

Second, as Congress has said, it is in the public interest to increase access to noncommercial educational programming and services. *See* 47 USC §396(a)(1).[8] Must carry during the transition will ensure that cable subscribers have easy access to this programming, and, by increasing revenues as discussed above, will ensure that *all* viewers will continue to receive the important analog and digital programming provided by noncommercial stations. *Turner Broadcasting System Inc. v. Federal Communications Commission*, 117 S.Ct. 1174, 1186 (1997) (*Turner II*); *Turner Broadcasting System Inc. v. Federal Communications Commission*, 114 S. Ct. 2445, 2461 (1994) (*Turner I*).

---

[7]For example, in 1994, local stations received approximately $137 million; in 1995, $143 million; in 1996, $137 million; in 1997, $130 million; in 1998, $125 million and in 1999, $125 million. Source: Corporation for Public Broadcasting.

[8]The Congress hereby finds and declares that-

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;...

47 USC §396(a)(1).

This must carry right should not be unconditional, however. Noncommercial stations will not benefit financially, and the public will not benefit from increased programming, if carriage is given only to programming that is the same both in analog or digital. Thus, must carry should only redound to those video and non-video streams that do not duplicate the station's analog signal. "Duplication" should not include "time shifting" or other similar variations on programming, but would essentially encompass simulcasting of digital and analog programming.

Similarly, the public will not benefit from increased noncommercial programming if what is carried by cable systems is advertiser supported programming carried on the noncommercial station's bit stream. UCC, *et al.* have already argued in several separate dockets that the Communications Act prohibits noncommercial stations from broadcasting advertiser supported programming on its digital capacity. Opposition to Petitions for Reconsideration at 6-9; DTV Fees Comments at 15-17. Regardless of what the Commission decides on this legal issue, such programming should not receive must carry.

C. Carriage of Noncommercial Broadcasters' Analog and Digital Signals During the Transition Will Not Significantly Burden Cable Operators.

Under the Commission's *DTV Fifth Report and Order*, *supra*, noncommercial television licensees have been given until May 1, 2003 to construct their digital television facilities. This is far longer than other licensees. *Id.* at 12841. Noncommercial stations were given the most time out of recognition that they lack the financial resources for a rapid conversion to digital. *Id.*

It is unlikely that many stations will convert far ahead of the 2003 date. For this reason, and because those stations seeking to convert quickly (for example, WETA-TV in Washington) are most likely to be larger noncommercial stations that would likely receive cable carriage in

any event, the burden on cable operators will not be significant. With noncommercial station conversion to digital still at least five years away;[9] cable systems should have adequate time to upgrade their systems to accommodate them.

With respect to signal duplication, UCC, *et al.* believe that the Commission should follow the same policy for noncommercial programming as it has advocated for commercial programming. To the extent that the upgrade to digital would only result in duplicative noncommercial programming, the noncommercial licensee should be required to choose between its analog and digital signals.

V. THE COMMISSION MAY NOT, AS A MATTER OF LAW, EXTEND DIGITAL MUST CARRY BENEFITS TO STATIONS THAT ARE PREDOMINANTLY DEVOTED TO SALES PRESENTATIONS.

Whatever must carry benefits the Commission may choose to extend to commercial or non-commercial stations during or after the transition period should not, under any circumstances, be extended to stations that are "predominantly utilized for the transmission of sales presentations or program length commercials." 47 USC §534(g)(4). As UCC, *et al.* has argued in the Commission's Ancillary and Supplementary Fees Proceeding, MM Docket No. 97-247, so-called "home shopping" program services are "ancillary or supplementary services" because they are substantially devoted to programming "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee

---

[9]The Commission has said that it will give waivers of the construction date for good cause. *DTV Fifth Report and Order*, 12 FCC Rcd at 12841.

is not required)," 47 USC §336 (e)(1)(A). Thus, under 47 USC §336(b)(3),[10] they are not entitled to must carry. *See* Comments of UCC, *et al.* in MM Docket No. 97-247 at 12-15.

Although the Commission was directed to resolve its treatment of home shopping stations by July, 1993, it inquiry into these practices remains open. A pending Petition for Reconsideration of the Center for the Study of Commercialism *In re: Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Stations*, MM Docket 93-8, seeks a ruling that stations broadcasting little but commercial sales presentations for the vast majority of the day do not serve the public interest, convenience and necessity as required by the Communications Act, and are therefore deserving of neither must carry nor licensure.

The Commission notes in passing the pendency of the Petition for Reconsideration, *NPRM* at ¶4 n. 9, but its resolution is critical not only to this docket, but to other matters that are, or will be, before the Commission in the near future. Until the Commission makes clear what the public interest standard requires or prohibits, it cannot determine whether and which broadcast stations justify must carry in the digital age. Nor can it determine, as it promised in its *Digital Television Fifth Report and Order*, 12 FCCRcd 12809, 12830 (1997) what appropriate public interest obligations should be for digital TV broadcasters.

Regardless of how the Commission rules on the Petition for Reconsideration, it would be difficult, if not impossible, for the Commission to justify digital must carry for home shopping stations. Congress based analog must carry on a number of public interest justifications, in-

---

[10]"no ancillary or supplementary service shall have any rights to carriage under section 614 or 615...." *Id.*

cluding broadcast television as a source of "local origination of programming," and broadcast television as an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act at §2(a)(10)&(11). It was these justifications, as well as Congress' predictive judgments about the future of the broadcast industry in the absence of must carry in the analog age that led the Supreme Court in *Turner II* to uphold the must carry laws as constitutional. *Turner II, 117 S.Ct. at 1190-97.* Regardless of whatever findings of financial harm may be alleged in the absence of must carry in the digital age, it will be impossible to justify digital must carry (during or after the transition) under the *Turner* cases if certain stations engage in nothing but commercial sales presentations for 55 to 60 minutes out of each hour for the majority of the day, and carry little or no locally-originated or oriented programming. Indeed, it may be difficult for the Commission to justify must carry for ***any*** station that provides little or nothing beyond satellite-delivered national programming.

VI. TECHNOLOGY, NOT COMMISSION POLITICS, SHOULD GOVERN WHEN AND HOW THE COMMISSION SHOULD RESOLVE INTEROPERABILITY PROBLEMS OR OTHER TECHNOLOGICAL ISSUES.

The Commission recognizes, and seeks comment upon, various unresolved technological issues surrounding must carry, including interoperability of DTV broadcast, cable systems, set-top boxes and digital receivers. *NPRM* at ¶¶25-30 & ¶¶62-68. For example, it asks whether it should adopt a requirement that cable "set top boxes be designed to process all types of digital broadcast television formats." *NPRM* at ¶29, and seeks comment on the cost of such a requirement on cable operators and viewers. *Id.* It also asks whether cable operators not carrying digital broadcast signals in their original formats would be unlawful as "material degradation" of the TV station's signal. 47 USC §534(b)(4)(A).

The breadth and complexity of the Commission's questions confirm what UCC, *et al.* has already said: the technological uncertainties concerning digital TV are numerous and evolving. Given that must carry rules are premature for a number of reasons, *see* Section I, *infra*, the Commission should, at least for now, permit the marketplace to find a solution for these problems. If, when the time for a decision in this matter is ripe and the marketplace has not found a technological fix, the Commission should consider intervention to ensure

- openness and affordability of set-top boxes and digital receivers;
- the broadest delivery of diverse programming and services;[11] and
- that the quality of the digital is not "materially" degraded.[12]

CONCLUSION

It is too soon for the Commission to adopt must carry rules. Open technological, economic and legal issues surround the conversion to digital television and the need for such rules at this time is dubious at best. Making premature regulatory decisions that will affect evolving technologies can stunt the growth of those technologies and delay viewer acceptance. The Commission should resist outside pressures and defer this matter until it is ripe.

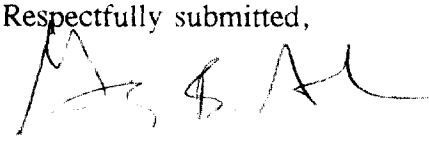
---

[11]For example, a requirement that cable systems retransmit the same DTV formats as broadcasters send to them could have an adverse effect on diversity and choice. The 720p format that cable operators prefer uses spectrum far more efficiently than the 1080i format, allowing for the provision of more programming and services.

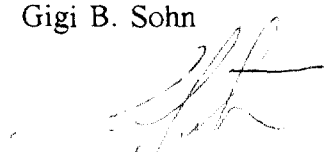
[12]The Commission notes that the cable and broadcast industries have been debating whether a cable operator "materially degrades" a broadcaster's 1080i signal by converting it to 720p. *NPRM* at ¶68. But only the most sophisticated eye can tell the difference between a 1080i and 720p signal, and even then, reasonable minds can differ about which is the qualitatively superior signal. Because the differences between the signals are *de minimus*, the conversion of the broadcaster's digital transmission can scarcely be considered "material" degradation, if it can at all be considered "degradation." *See* 47 USC §534(b)(4)(A).

If the Commission nonetheless decides to act at this time, it should ensure that whatever rules it adopts promote the dual interests of promoting a diversity of ideas and information and accelerating the conversion to digital. Giving broadcasters the choice to select which one of their two signals will receive the privilege of must carry would balance the public's right to have a viable system of free TV with the need to avoid undue burdens on cable operators. For the same reason, noncommercial broadcasters should get immediate must carry for their digital programming and services, provided that they are not duplicative nor advertiser supported.

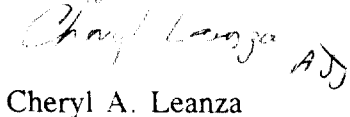
Respectfully submitted,



Gigi B. Sohn



Andrew Jay Schwartzman



Cheryl A. Leanza

MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
202-232-4300

Law Student Intern:

Sabrina L. Youdim
UCLA School of Law

October 13, 1998